2019

State of Utah, Plaintiff/Appellee, v. Steven Norman Powell, Defendant/Appellant : Brief of Appellee

Utah Court of Appeals

Case No. 20180109-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

STEVEN NORMAN POWELL,
Defendant/Appellant.

Brief of Appellee

Appeal from two convictions for lewdness, a third degree felony, in the Third Judicial District, Salt Lake County, the Honorable Mark Kouris presiding

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INTRODUCTION

While shopping with her stepmom at Walmart, 24-year-old Anastasia saw defendant Steven Norman Powell, who was wheelchair-bound, with the crotch of his pants cut out or pulled down and his genitals exposed; only a very see-through netting was placed over them. Anastasia got her stepmom and she saw the same thing. About a month later during "Black Friday" shopping, Anastasia and her stepmom were at Shopko and Anastasia again saw Powell with his genitals exposed, as before. She got her stepmom, and she too saw Powell with his genitals exposed and tried to snap a photo of him as evidence. But Powell saw her and covered his crotch with the leg of a pair of slacks hanging on a rack just before she snapped the picture.

The stepmom filed a complaint a day after the Shopko incident, but it was not investigated until some nine months later. The detective on the case learned that Walmart had recorded over its surveillance footage, but he was able to view relevant surveillance footage from Shopko. The video confirmed that Powell was at the Shopko on Black Friday, showing him enter and exit the store. The detective was also able to somewhat track Powell's movements in the store—camera coverage was not complete—but he saw no footage showing Powell with his genitals exposed. The detective took a screenshot picture of Powell in the store and another of his van in the parking lot as evidence he was there.

The detective later interviewed Powell at his home. Powell admitted that he had been to the Walmart and Shopko and when asked why he exposed himself, Powell explained that he did it for the thrill of it. He said that he had resorted to this behavior after he was paralyzed from the waist down in an accident at age 27.

Powell claims on appeal that his counsel was constitutionally ineffective in representing him, but he has not hurdled the high bar required for such a claim. He claims that counsel was ineffective for not moving to dismiss the case on due process grounds, arguing that the State failed to preserve the video evidence. But the State never possessed the Walmart

surveillance—it had already been recorded over before the detective could see it—and the detective only collected the screenshots from the Shopko video. Moreover, the record does not support Powell's claim that the Shopko video was lost or destroyed. In light of controlling caselaw, reasonable counsel could conclude that a motion to dismiss would fail. And among the reasons it would fail is that the video would show no more than what the State admitted—the video did not show Powell with his genitals exposed.

Powell also claims that counsel was ineffective for not objecting to the elements instructions for lewdness. But again, reasonable counsel could conclude that the elements instructions accurately set forth the law, i.e., lewdness does not involve an attempt, the relevant mental state for lewdness includes recklessness, and caselaw defining "any other act of lewdness" did not apply in this case because Powell's charges rested on evidence that he exposed his genitals.

Powell also contends that the district court erred in denying his motion for a directed verdict based on insufficient evidence. But where Anastasia and her mother testified that they saw Powell with his genitals exposed in Walmart and Shopko, and Powell admitted to the detective that he was at the stores on the nights in question and exposed himself for the thrill of it, the evidence was more than sufficient to submit the case to the jury.

STATEMENT OF THE ISSUES

1. Was trial counsel constitutionally ineffective for (a) not moving to dismiss the case on the ground that Powell's due process rights were violated by the police department's alleged failure to preserve surveillance video, and (b) not objecting to the elements instructions on lewdness?[1]

Standard of Review. A claim of ineffective assistance of counsel raised for the first time on appeal is a question of law. *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162. That said, "[j]udicial scrutiny of counsel's performance [is] highly deferential," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and this Court will not reverse for ineffective assistance unless "no competent attorney" would have proceeded as counsel did in this case and it prejudiced the defense, *see Premo v. Moore*, 562 U.S. 115, 124 (2011).

2. Was the evidence sufficient to support Powell's convictions for lewdness?

Standard of Review. A trial court's denial of a motion for a directed verdict is reviewed for correctness. *State v. Gonzalez*, 2015 UT 10, ¶21, 345 P.3d

[1] Powell addresses his two ineffective-assistance-of-counsel (IAC) claims in two points. He addresses his IAC claim related to the alleged due process violation in point III of his brief, *see* Aplt.Br. 35-50, but the State addresses it in point I.A of its brief. He addresses his IAC claim related to the elements instructions in point I of his brief, Aplt.Br. 5-20, but the State addresses it in point I.B of its brief.

1168. But in reviewing the sufficiency of the evidence, this Court reviews the evidence "in the light most favorable to the State" and must uphold the denial of a directed verdict motion so long as "some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *Id.* at ¶27 (cleaned up).

STATEMENT OF THE CASE

A. Summary of relevant facts.

Twenty-four-year-old Anastasia and her stepmom had two separate encounters with Powell, who was wheelchair bound, in which he exposed his genitals. R393,396-99.

1. Powell exposes himself at Walmart.

On a weekend evening in October 2014, Anastasia, together with her stepmom, aunt, and some of her stepmom's coworkers, interrupted their craft night with a snack run at Walmart. R393-96,413, 429-30,444-45. After arriving at the store, Anastasia split off from the group to make her way toward the cosmetics section. R395,430.

As Anastasia walked down the main aisle toward the cosmetics section, she saw Powell, with his penis exposed, emerge from the women's clothing section and into the main aisle where she was walking. R395-99. She was less than five feet from him. R414. And Powell did "not just [have] his

zipper down, but, like, full-on nothing [was] covering down there"—only some kind of "like fishnet stockings that you wear for maybe a costume" that is [v]ery see-through." R396. It was almost as if he owned "a pair of pants with nothing" in the crotch area, "like [it had been] cut out," because it was "more than just [the] zipper being down that [she] could see." R398.

Anastasia left the area to find her stepmom and aunt, told them that "this guy just flashed" her, and led them back to Powell to verify what she had just witnessed. R399,414-17,431. When they returned, Powell had just left women's clothing and was in the jewelry section. R399,416. He did not appear to be shopping for anything and his genitals were still exposed. R399-400. Anastasia's stepmom looked at Powell for 30-40 seconds and saw the same thing Anastasia had—Powell had "jeans on and the crotch was cut out with some black mesh, and [she] saw his penis." R432-33,445-47.

The women reported what they had seen to Walmart personnel, who escorted Powell from the store. R400-01,417,434,447. Walmart did not report the incident to the police. R482.

2. One month later, Powell exposes himself at Shopko.

The following month on Thanksgiving night, Anastasia went to Shopko for Black Friday shopping with her two younger brothers and her stepmom, who met them there. R402,405,418,427. Anastasia encountered

Powell again with his genitals exposed as before. R403-04,419. She saw him in the children's clothing section and was about 20 feet from Powell. R403-04,419. He was "wearing the same" jeans with nothing covering his crotch and she clearly saw his genitals. R404,419. It felt "creepy." R421,424.

Anastasia found her stepmom, told her that Powell was in the store, and was exposing himself. R405,435.[2] Both women couldn't believe this was "happening again." R405,435-36. Hoping to take a picture of Powell in the act, Anastasia's stepmom got her smartphone and found Powell, still exposed, in the men's clothing section adjacent to children's clothing. R405,419-20,436. When the stepmom initially walked near him, she could not get a clear picture, so she walked past and then returned and took a picture. R437-38,441. But Powell saw her with smartphone in hand and just before she snapped the picture, he grabbed the leg of a pair of slacks hanging on a rack and placed it over his genitals. R407-10,420-21,438-40; SE1 (photo taken by stepmom).

The women left and notified Shopko personnel, but were subsequently told that he was seen leaving the store. R421,441-42. Shopko filed no report

[2] The testimony on this point varies, with Anastasia testifying that she alerted her stepmom, R405, and the stepmom testifying that it was Anastasia's brother who alerted her, R435.

with the police. R482. But the next day, Anastasia's stepmom and aunt reported what they had seen on the West Valley City Police Department's Facebook website. R422,447-48.

Neither Anastasia nor her stepmom saw anything out of the ordinary, in either incident, related to Powell's penis—there was no tubing, medical devices, or anything else unusual on or around his penis. R405,424-25,433,450,455.

3. Police investigate the complaint and Powell admits to the conduct.

Some nine months later, Detective Jason Vincent from the West Valley City Police Department began investigating the Facebook complaint. R422-23,448,457,468. After getting written statements from both women, he checked with Walmart and Shopko to determine whether they had surveillance video of the two incidents. R457-58,469-70. Det. Vincent learned that Walmart only keeps surveillance footage for about 30 days and had already recorded over it. R458,470. But Shopko still had surveillance video from Thanksgiving that he was allowed to review. R458.

In watching the video, Det. Vincent saw a man in a wheelchair—whom he subsequently identified as Powell—enter and later exit Shopko, and he was able to partially track his movements in the store (the surveillance cameras do not provide full coverage of the entire store). R460,471-72,478-79.

In tracking Powell's movements, he "never found any footage of him exposing himself," despite the ability to zoom in on images. R472. Det. Vincent did not see either complainant in the video, but was focusing on Powell. R483. Det. Vincent captured two screen shots that demonstrated no more than the fact that Powell was at the Shopko on Thanksgiving night—one showing his face and upper body in a clothing aisle and the other showing a van. R458-59; SE2-3.

Det. Vincent and another officer conducted a knock-and-talk at Powell's residence. R460. Det. Vincent explained why he was there and asked Powell if they could look through his cell phone and computer. R461. Powell consented and while the assisting officer looked through the two electronic devices, Det. Vincent questioned Powell about the reports. *See* R461,480.[3] That officer "did not locate anything criminal" on either Powell's cell phone or computer. R475. The two officers also looked around the house but did not find any pants with mesh over the crotch area or anything else that was incriminating. R475-76,480.

[3] West Valley City equips officers with a body cam, but because Det. Vincent is also on loan with Homeland Security, which does not permit body cams, he was not wearing a body cam when he interviewed Powell at his residence. R473-74,479.

Det. Vincent asked Powell if he was at Walmart and Shopko and he confirmed that he was. R462. When Det. Vincent asked why he was exposing himself, Powell explained that when he was 27 years old, he became paralyzed from the waist down following a car accident. R461-62. He said that before the accident, he was a "thrill seeker" and participated in dangerous activities or sports. R461-62. He explained that since that time, exposing himself was "one of the things that he did to create excitement in his life"—"for the thrill of it." R462. He admitted that when he did it, he wore a see-through mesh material. R463. He also admitted that this was not an isolated incident. R467. He was initially coy about how often he went into the community exposing himself, but ultimately admitted that he did so two or three times a month. R464.

In his written statement, Powell largely confirmed what he told Det. Vincent—admitting that he began resorting to lewd behavior for the adrenaline rush. R466; SE4A-B. But in that statement, he added for the first time that his condom catheter became kinked while at the Shopko on Thanksgiving night and he tried to unkink it so he wouldn't wet his pants. R467,476-77,481-82. He stated, however, that he did not believe anyone saw him doing so, but said he could be wrong. R467,476-77; SE4A-4B. He also stated that he's been confronted about it before and feels bad for doing it. R467-68; SE4A-4B.

B. Summary of proceedings and disposition of the court.

Powell was charged with two counts of lewdness, enhanced to third degree felonies for two prior lewdness convictions, in violation of Utah Code Ann. § 76-9-702(2)(b) (Westlaw, 2014). R1-4,121-23. At the close of the State's case in a one-day, bifurcated trial, the defense moved for a directed verdict, arguing that because the two witnesses' testimony was not corroborated by any additional information, the evidence was insufficient to submit the case to the jury. R491-92. The court denied the motion. R492.

The jury found Powell guilty beyond a reasonable doubt of both lewdness counts and the judge found beyond a reasonable doubt that Powell was guilty of the enhancements. R176-78,532-34.[4] After submission of a presentence investigation report, the district court sentenced Powell to two concurrent prison terms of up to five years. R220-21.

Powell timely appealed. R223-24,230. And in connection with his appeal, Powell filed a rule 23B remand motion for findings supporting a claim that counsel was ineffective (1) by improperly advising him regarding his right not to testify at trial, and (2) by not filing a motion to suppress his

[4] This was a second trial. The first resulted in a mistrial before testimony was taken, when one of the jurors disclosed a bias she had not made known during voir dire. R297-301.

statements to Det. Vincent on the ground that the detective did not advise him of his *Miranda* rights. *See* Rule 23B Motion to Remand.

SUMMARY OF ARGUMENT

Powell claims that counsel was ineffective for not moving to dismiss the case on due process grounds, arguing that the State failed to preserve the surveillance video. But the State never possessed the Walmart surveillance video—it had already been recorded over before the detective could see it—and the detective only collected the screenshots from the Shopko video. Moreover, the record does not support Powell's claim that the Shopko video was lost or destroyed. In light of controlling caselaw, reasonable counsel could conclude that a motion to dismiss would fail. And among the reasons it would fail is that the video would show no more than what the State admitted—the video did not show Powell with his genitals exposed.

Powell also claims that counsel was ineffective for not objecting to the elements instructions for lewdness. But again, reasonable counsel could conclude that the elements instructions accurately set forth the law, i.e., lewdness does not involve an attempt, the relevant mental state for lewdness includes recklessness, and caselaw defining "any other act of lewdness" did not apply in this case because Powell's charges rested on evidence that he exposed his genitals.

Powell also contends that the district court erred in denying his motion for a directed verdict based on insufficient evidence. But where Anastasia and her mother testified that they saw Powell with his genitals exposed in Walmart and Shopko, and Powell admitted to the detective that he was at the stores on the nights in question and exposed himself for the thrill of it, the evidence was more than sufficient to submit the case to the jury.

ARGUMENT

I.

Powell's trial counsel was not ineffective for not moving to dismiss the case on due process grounds and for not objecting to the elements instructions on lewdness.

Powell claims that his trial counsel was constitutionally ineffective for two reasons. He contends that counsel was ineffective for not moving to dismiss the case on due process grounds for the alleged failure of the police department to preserve exculpatory evidence, to wit, surveillance videos from both Walmart and Shopko. Aplt.Br. 35-50 (point III). And he argues that counsel was ineffective for not objecting to the elements instructions on lewdness. Aplt.Br. 5-20 (point I).

To prevail on a claim of ineffective assistance of counsel, a defendant must make the two-part showing established in *Strickland v. Washington*, 466 U.S. 668 (1984). He must prove that (1) counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." *Id.* at 687. Because a defendant must make "both showings," a failure to prove either *Strickland* element is fatal to an ineffective-assistance claim. *Id.* The bar for proving ineffective assistance is high and "never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Powell has not overcome that high bar.

A. Trial counsel was not ineffective for not moving to dismiss the case on due process grounds.

Powell claims that his trial counsel was ineffective for not moving to dismiss the case on due process grounds based on the police department's alleged failure to preserve video surveillance from Walmart and Shopko. Aplt.Br. 35-50. As noted, Powell "must show both that counsel's performance fell below an objective standard of reasonableness, and that there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Powell's ineffective-assistance claim fails for three reasons. First, his claim is not, at least in part, supported by the record. Second, Powell does not argue, let alone prove, that counsel's performance was both deficient and prejudicial. And third, counsel could not prove either deficient performance or prejudice.

1. The record does not support Powell's contention that the Shopko surveillance video was not available to trial counsel.

Powell's ineffective-assistance claim fails at the outset because it is based, at least in part, on alleged facts not supported by the record.

The law is settled that "a defendant cannot bring an ineffective assistance of counsel claim on appeal without pointing to specific instances *in the record* demonstrating both counsel's deficient performance and the

prejudice it caused defendant." *State v. Griffin*, 2015 UT 18, ¶16 (emphasis added). Powell's claim that trial counsel was ineffective for not moving to dismiss rests, in part, on the premise that the State seized the Shopko surveillance video, never made it available to trial counsel, and then lost or destroyed it. But none of those alleged facts appear in the record.

Powell claims that Det. Vincent "lost or destroyed [the video] after viewing the footage." Aplt.Br. 42,46-47 (cleaned up). But he does not cite to anything in the record supporting that proposition. Det. Vincent testified that Shopko pulled the surveillance video for him, that he reviewed it, and that he took some screenshots showing Powell in the store and Powell's van outside the store. R458-59; SE2-3. But there is nothing in the record suggesting that Det. Vincent kept the video, that it was not available for trial counsel's review at Shopko, or if the detective kept the video, that he lost or destroyed it, or that the prosecution did not make it available to trial counsel.

In sum, the record does not support the allegations made in the brief related to the Shopko video. Consequently, Powell's ineffective-assistance claim related to the Shopko video fails at the outset.

2. Powell fails to argue, let alone prove, both deficient performance and prejudice.

In any event, Powell's ineffective-assistance argument on appeal is fatally lacking.

As noted, Powell must show both deficient performance and prejudice to prove ineffective assistance of counsel. *Id.* But because "defense counsel's failure to litigate a [due process] claim is the principle allegation" of Powell's claim of ineffectiveness," he bears an additional burden: he "*must also prove* that his … claim is meritorious and that there is a reasonable probability that the verdict would have been different" as a result. *Id.* (emphasis added).

Thus, in addition to proving deficient performance and prejudice, Powell must prove that any such motion would have succeeded. If he cannot do that, his ineffectiveness claim is a nonstarter. *See State v. Kelley*, 2000 UT 41, ¶26, 1 P.3d 546. *On the other hand*, proving that he would have succeeded on the motion is not nearly enough to prevail on his ineffectiveness claim—it is only a beginning. As the U.S. Supreme Court explained, a concession that a particular motion would have succeeded "*is not the same as a concession that no competent attorney would think a motion … would have failed, which is the relevant question under Strickland*." *Premo v. Moore*, 562 U.S. 115, 124 (2011) (emphasis added).

In his brief, Powell does no more than argue that a motion to dismiss on due process grounds would have succeeded. Relying on the due process analysis set forth in *State v. DeJesus*, 2017 UT 22, 395 P.3d 111, Powell contends that (1) there is a reasonable probability the surveillance videos would have

been exculpatory, Aplt.Br. 38-41, and (2) dismissal was merited because (a) the police department had a duty to collect and preserve the evidence, Aplt.Br. 41-44, and (b) its failure to do so resulted in prejudice inasmuch as the surveillance footage "would have been a complete and continuously filmed recording of [him] while he was in the store," Aplt.Br. 45-50. This is the sum and substance of Powell's ineffective-assistance argument.

Powell's ineffective-assistance claim is lacking. Indeed, the Court can, for the sake of argument, assume that a motion to dismiss "would have succeeded," *Premo*, 562 U.S. at 124, just as Powell argues in his brief, Aplt.Br. 35-50. But "that is not the same as [demonstrating] that no competent attorney would think a motion to [dismiss] would have failed, which is the relevant question under *Strickland*." *Id.* Even though "a meritorious [due process] issue is necessary to the success of a Sixth Amendment claim like [Powell's], a good [due process] claim alone will not earn" him relief on appeal. *Kimmelman*, 477 U.S. at 382. Powell must still "prove under *Strickland* that [he has] been denied a fair trial by the gross incompetence of [his] attorneys." *Id.*

Because Powell does no more than argue that a motion to dismiss on due process grounds would have succeeded, he has not surmounted the "highly demanding" burden of proving ineffective assistance. *See id.* He has not argued, let alone proven, that his counsel was deficient for not moving to

dismiss on due process grounds. Again, that is so even assuming arguendo the motion would have succeeded—Powell must also demonstrate that "no competent attorney would think a motion to [dismiss] would have failed." *Premo*, 562 U.S. at 124. He has not argued, let alone proven, that not filing the motion resulted in prejudice. In the context of *Strickland*, that means that had he filed a motion, there is a "substantial" likelihood of a different result at trial. *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011). For these reasons, Powell has not overcome the high bar for proving ineffective assistance and the Court should reject his claim.

3. Powell could not prove that all competent counsel would believe that a motion to dismiss would succeed.

In any event, Powell could not meet *Strickland's* high bar because reasonable counsel could conclude that any motion to dismiss would fail (and incidentally, it would have). Applying its holding in *State v. Tiedemann*, 2007 UT 49, 162 P.3d 1106, the Utah Supreme Court in *DeJesus* recognized a "two-step analysis" in assessing whether a defendant's due process rights are violated when the State loses or destroys evidence in its possession, and if so, the appropriate sanction. *DeJesus*, 2017 UT 22, ¶27. First, the defendant must make a "threshold" showing that the State violated due process by "demonstrating a reasonable probability that the lost evidence would have been exculpatory." *Id.* Second, if the defendant makes that threshold

showing, the court then "must balance the culpability of the State and the prejudice to the defendant in order to gauge the seriousness of the due process violation and to determine an appropriate remedy." *Id.*

But caselaw governing the State's due process obligation to preserve evidence extends only to evidence it possesses: "It is a matter of clear Utah law that criminal defendants are entitled to information *possessed by the State* to aid in their defense." *State v. Tiedemann*, 2007 UT 49, ¶40, 162 P.3d 1106 (emphasis added).

Reasonable counsel could thus conclude that the due process requirements identified in *Tiedemann* and *DeJesus* did not apply here because the State never possessed the video footage. Det. Vincent never even saw video footage from Walmart because by the time the case came across his desk, Walmart had recorded over it. R458,470. And although Det. Vincent testified that Shopko pulled surveillance video for him to review, R458, the record does not show that he seized the recording. He testified that he "collected some of that," to wit, the photo showing Powell in the store (SE2) and the photo of Powell's van (SE3). *See* R458-59. Det. Vincent's video review was akin to police investigating a crime scene in search of physical evidence—detectives will collect evidence they conclude is relevant and leave the rest behind. In this case, Det. Vincent confirmed that the surveillance

video never captured Powell with his genitals exposed. R472. As a result, he captured screen shots establishing Powell's presence in the store that night—nothing more.

In arguing a due process violation, Powell makes broad and far-reaching claims that the stores themselves have an "independent duty … to maintain the video" and that law enforcement has a duty to conduct "some minimal police investigation to preserve potential evidence for future use," including "an initial quick inquiry" so that video evidence will be preserved. Aplt.Br. 43-44. Powell contends that the police in this case "additionally bear the burden for not having an immediate screening or filtering process in how and when they respond to a citizen's online report of a crime." Aplt.Br. 44. But Powell cites no case law supporting these broad propositions and the State can find none.

A similar argument was made more than three decades ago: "The defendant urges this Court to recognize a duty of the prosecution to gather all relevant evidence regardless of its impact on the success of the prosecution." *State v. Shaffer*, 725 P.2d 1301, 1306 (Utah 1986). And the Utah Supreme Court rejected it, holding that "[a]lthough the prosecution and investigators should preserve all incriminating and exculpatory evidence material to a case, the prosecution is *not required* to search for exculpatory

evidence, conduct tests, or exhaustively pursue every angle on a case." *Id.* (cleaned up) (emphasis added); *accord State v. Bakalov*, 1999 UT 45, ¶50, 979 P.2d 799 (quoting *Shaffer*). The Court explained that "imposing a duty on the prosecution to search for all relevant evidence … would require Herculean efforts by the prosecution. *Shaffer*, 725 P.2d at 1306. And imposing such a duty "before a suspect has been identified and before the State is notified of possible defenses, is to require the impossible." *Id.*

In sum, given the facts of the case and the controlling caselaw, reasonable counsel could conclude that a motion to dismiss would fail because the police never possessed the surveillance videos.

Reasonable counsel could also conclude that there was not a reasonable probability that the video would have been exculpatory—even if the State had possessed and lost it. In *DeJesus*, the Utah Supreme Court held that "in order to satisfy the reasonable probability standard in the lost evidence context, "a defendant must make some proffer as to the lost evidence and its claimed benefit." 2017 UT 22, ¶39. And the court held that "[s]o long as the lost evidence and its claimed benefit is not pure speculation or wholly incredible, the standard will be satisfied." *Id.* But Powell's proffer here is pure speculation.

Without record support, Powell claims that Walmart and Shopko have "security surveillance systems in place from above and at multiple angles from within the store" that "would have captured his exposed state at one angle or another for at least a second or more." Aplt.Br. 38-39. But the only testimony on the coverage of the surveillance cameras came from the officer, who testified that "Shopko only has a specific amount of cameras" and thus a person moving around the store would not always be in the camera's view. R478. Powell proffered no evidence—from store personnel or anyone else—that the cameras would have captured him where the two women said he exposed himself. Powell claims that the screenshot from the Shopko video (SE2) shows him in the same clothing section that Anastasia and her stepmom saw him exposing himself (SE1), but again, there was no testimony to that fact and it is not apparent from a comparison of the photos. Again, Powell's claim is pure speculation.

Powell nevertheless contends that there was a reasonable probability that the video would have provided exculpatory evidence because it "would have been a complete and continuously filmed recording of [him] while he was in the store." Aplt.Br. 46. But even assuming for the sake of argument that were true, the Utah Supreme Court has held that such is insufficient to show a reasonable probability: "It is certainly true that a video recording of

the incident would have been highly probative of what truly happened. But simply stating that video recordings can be helpful to determine truth does not establish that this particular video recording would have been helpful to [defendant] in the specific circumstances of his case." *State v. Mohamud*, 2017 UT 23, ¶21, 395 P.3d 133.

Given this case law, reasonable counsel could again conclude that a motion to dismiss would have failed.

Additionally, reasonable counsel could conclude that dismissal would not result even if there were a reasonable probability that the video would have provided exculpatory information. *DeJesus* holds that in determining an appropriate sanction, courts must consider both the culpability of the State and the prejudice suffered. 2017 UT 22, ¶27. As noted, the caselaw suggests that the State bore no responsibility for collecting the evidence. Moreover, the State never claimed that the video would have corroborated its witnesses, as was the case in both *Tiedemann* and *DeJesus*. In fact, Det. Vincent testified that in tracking Powell's movements, he "never found any footage of him exposing himself," despite the ability to zoom in on images. R472. Accordingly, the video would have been no more probative than the detective's testimony. Under these circumstances, reasonable counsel could conclude that a motion to dismiss would not have succeeded.

In sum, given the relevant evidence in the case and governing caselaw, Powell has not demonstrated that "no competent attorney would think a motion to [dismiss] would have failed, which is the relevant question under Strickland." *Premo*, 562 U.S. at 124. Nor has he demonstrated a reasonable likelihood of a different result had counsel filed a motion to dismiss.

B. Trial counsel was not ineffective for not objecting to the elements instructions on lewdness.

Powell also contends that trial counsel was ineffective for not objecting to the elements instructions on lewdness. Aplt.Br. 5-20. Those instructions required the jury to find beyond a reasonable doubt each of the following elements:

1. STEVEN NORMAN POWELL;
2. Intentionally, knowingly, or recklessly performed any of the following acts:
    a. An act of sexual intercourse or sodomy;
    b. Exposed his genitals, buttocks, anus, or his pubic area;
    c. Masturbated; or
    d. Any other act of lewdness[;]
3. And did so
    a. In a public place or
    b. Under circumstances which the defendant should have known would likely cause affront or alarm to another 14 years of age or older.

R198-99 (Inst. 18-19).

Powell argues that the instruction incorrectly permitted a conviction for performing an act of lewdness "recklessly." Aplt.Br. 10-15. His argument that lewdness does not involve reckless conduct rests on (1) the introductory "not amounting to" clause of the statute that includes an attempt to commit certain offenses, and (2) caselaw holding that an attempt requires intentional conduct. Aplt.Br. 10-11. He also relies on a policy argument based on a comparison of the lewdness statute with the lewdness involving a child statute. Aplt.Br. 12-15.

But Powell's interpretation of the statute is a novel one and reasonable counsel could conclude that based on existing law, the instructions correctly identified the elements of the lewdness offense. First, the plain language of the statute supports the conclusion that "attempt" is not an element of the offense. The lewdness statute includes a "not amounting to" clause (italicized) and a "performance" clause (shaded):

> A person is guilty of lewdness if the person ***under circumstances not amounting to*** *rape, object rape, forcible sodomy, forcible sexual abuse, aggravated sexual assault, sexual abuse of a minor, unlawful sexual conduct with a 16- or 17-year-old, custodial sexual relations or misconduct under Section 76-5-412 or 76-5-413,* ***or an attempt to commit any of these offenses***, performs any of the following acts in a public place or under circumstances which the person should know will likely cause affront or alarm to, on, or in the presence of another who is 14 years of age or older:
>
> (a) an act of sexual intercourse or sodomy;

(b) exposes his or her genitals, the female breast below the top of the areola, the buttocks, the anus, or the pubic area;

(c) masturbates; or

(d) any other act of lewdness.

Utah Code Ann. § 76-9-702(1) (Westlaw, 2019) (highlights and emphases added).[5]

The statute thus provides that a person is guilty of lewdness if, "*under circumstances not amounting to*" a designated offense "*or an attempt to commit any of these offenses*" (not-amounting-to clause), the person "performs" any number of specified acts (performance clause). Utah Code Ann. § 76-9-702(1) (emphasis added). Accordingly, under a plain reading of the statute, the attempt language is tied to the "not amounting to" clause, not the ensuing performance clause.

Moreover, cases interpreting similar "not amounting to" language have uniformly held that such clauses do not constitute an element of the offense. *See, e.g., State v. Montoya,* 910 P.2d 441, 443–46 (Utah App. 1996) (concluding that "under circumstances not amounting to rape, rape of a child or aggravated sexual assault" is not a "discrete element of the crime of incest"); *State v. Ansari,* 2004 UT App 326, ¶¶ 10–13, 100 P.3d 231 (analyzing

[5] The State cites the current version of the statute because amendments since the lewd conduct in this case do not affect the issues raised on appeal.

the language "not amounting to an attempt, conspiracy, or solicitation" in Utah's internet enticement statute and concluding that the "clause does not require the State to affirmatively prove absence of attempt, conspiracy, and solicitation"); *State v. Young*, 2015 UT App 286, ¶10, 364 P.3d 55 (holding that "Utah cases have interpreted similar provisions of other criminal statutes and held that those provisions do not require the State to disprove the defendant's commission of the act or acts the statutory language excludes").

Based on the foregoing, counsel could reasonably conclude that attempt is not an element of lewdness. And counsel could reasonably conclude that because the performance prong of the lewdness statute is silent as to a mental state, the applicable mental state is, by statute, intentional, knowing, or recklessness: "when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Utah Code Ann. § 76-2-102 (Westlaw, 2019).[6]

Powell also contends that the instruction was erroneous because, he argues, the statute requires that the victim of lewdness be 14 years of age or

[6] Accordingly, Powell's claim that counsel was ineffective for not requesting a lesser included instruction for attempt is likewise unavailing. *See* Aplt.Br. 15-18.

older, whether the conduct occurs in a public place or under circumstances that would cause affront or alarm. Aplt.Br. 6-9. Again, Powell cites no caselaw supporting that interpretation. And reasonable counsel could conclude based on the plain language of the statute that the 14-or-older requirement does not apply to a lewd act performed in a public place. The statute prohibits lewd acts "in a public place or under circumstances which the person should know will likely cause affront or alarm to, on, or in the presence of another who is 14 years of age or older." It is reasonable to read the latter phrase as one—"under circumstances which the person should know will likely cause affront or alarm *to, on, or in* the presence of another who is 14 years of age or older."

In any event, reasonable counsel could also conclude that given the undisputed facts of the case, it did not matter whether the instruction correctly stated the law as to the age of the victim—the evidence was undisputed that the victims here were a 24-year-old woman and her mother. And for the same reason, there could be no prejudice. *See State v. Garcia*, 2017 UT 53, ¶42, 424 P.3d 171 ("A proper [*Strickland*] analysis also needs to focus on the evidence before the jury and whether the jury could reasonably have found that [defendant] acted in imperfect self-defense such that a failure to instruct the jury properly undermines confidence in the verdict.").

Finally, Powell contends that the instruction should have narrowly defined his act of lewdness as defined in *State v. Bagnes*, 2014 UT 4, 322 P.3d 719, which interpreted the lewdness-involving-a-child statute. Aplt.Br. 18-20. But that case interpreted the meaning of "any other act of lewdness," which like the lewdness statute at issue here, follows a list of specifically-identified acts of lewdness. *See Bagnes*, 2014 UT 4, ¶¶11-12. As explained in *Bagness*, "[i]t is a catchall term at the end of an exemplary list" and "must be understood as similar in kind—involving an element of lasciviousness—to acts enumerated in the statute." *Id.* at ¶¶18-19 (cleaned up). Counsel could reasonably conclude that an instructional definition of "any other act of lewdness" was not required because the State's case did not rest on the catchall provision, but on the specifically-designated act of "exposing his or her genitals."

In sum, Powell has fallen far short of demonstrating ineffective assistance of counsel. He has not demonstrated that "no competent attorney would think" the instructions accurately stated the law. *Premo*, 562 U.S. at 124. And in fact, as shown, the instructions did accurately state the law.

II.

The evidence was more than sufficient to support Powell's convictions for lewdness.

Finally, Powell argues that the trial court erred in denying his motion for a directed verdict. Aplt.Br. 20-34. In support, he points to cases that have addressed the sufficiency of evidence supporting a finding that a defendant took "indecent liberties" under the forcible sexual abuse statute, Aplt.Br. 22-23, committed "any other act of lewdness" under the lewdness-involving-a child statute, Aplt.Br. 23-26, and committed a sexual activity *with* another person for a fee. Aplt.Br. 32-34. But Powell's conviction rested on none of those statutory provisions or theories, but on the provision in the lewdness statute that expressly prohibits a person from intentionally, knowingly, or recklessly "expos[ing] his or her genitals." Utah Code Ann. § 76-9-702(1)(b). Accordingly, the only question on appeal is whether the evidence was sufficient to support the jury finding that he did.

A defendant appealing the denial of a directed-verdict motion for insufficient evidence "must overcome a substantial burden on appeal to show that the trial court erred." *State v. Gonzalez*, 2015 UT 10, ¶21, 345 P.3d 1168. To begin with, the evidence adduced at trial—and all inferences that may fairly be drawn from that evidence—must be reviewed "in the light most favorable" to the jury verdict. *State v. Montoya*, 2004 UT 5, ¶29, 84 P.3d 1183.

Any " 'conflicts in the evidence' " must therefore be resolved " 'in favor of the jury verdict.' " *State v. Prater*, 2017 UT 13, ¶32, 392 P.3d 398 (quoting *State v. Workman*, 852 P.2d 981, 984 (Utah 1993)). Moreover, the trial court's denial of the directed-verdict motion "lends [even] further weight to the jury's verdict." *State v. Bluff*, 2002 UT 66, ¶63, 52 P.3d 1201, *abrogated on other grounds in Met v. State*, 2016 UT 51, 388 P.3d 447; *accord State v. Robbins*, 2009 UT 23, ¶15, 210 P.3d 288. This is so because the judge "who presided over a trial is in a far better position than an appellate court to determine … whether the evidence was sufficient to justify the verdict." *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2013 UT 24, ¶22, 309 P.3d 201.

Neither this Court nor the trial court may adjudge the evidence insufficient so long as " 'some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt.' " *Gonzalez*, 2015 UT 10, ¶27 (quoting *Montoya*, 2004 UT 5, ¶29). The evidence presented at trial here readily satisfies that standard.

Anastasia testified that as she walked down the main aisle in Walmart toward the cosmetics section, she saw Powell, with his penis exposed, emerge from the women's clothing section and into the main aisle where she was walking. R395-99. She was less than five feet from him. R414. And she testified that Powell did "not just [have] his zipper down, but, like, full-on

nothing [was] covering down there"—only some kind of "like fishnet stockings that you wear for maybe a costume" that is [v]ery see-through." R396. It was almost as if he owned "a pair of pants with nothing" in the crotch area, "like [it had been] cut out," because it was "more than just [the] zipper being down that [she] could see." R398. And Anastasia's stepmom likewise testified that when she went to verify Anastasia's account, she saw the same thing Anastasia saw—Powell had "jeans on and the crotch was cut out with some black mesh, and [she] saw his penis." R432-33,445-47.

Anastasia testified that a month later while shopping at Shopko, she encountered Powell again with his genitals exposed as before. R403-04,419. She saw him in the children's clothing section and was about 20 feet from Powell. R403-04,419. She testified that he was "wearing the same" jeans with nothing covering his crotch and she clearly saw his genitals. R404,419. And Anastasia's stepmom testified that she thereafter found Powell in the men's clothing section with his genitals exposed as before. R405,419-20,436. And she tried to take a picture with her smartphone, but just before she snapped the photo, Powell saw her with the camera and grabbed the leg of a pair of slacks hanging on a rack and placed it over his genitals. R407-10,420-21,437-41; SE1 (photo taken by stepmom).

But this was not all. Det. Vincent testified that when he interviewed Powell at his home, Powell confirmed that he was at Walmart and Shopko. R462. And when Det. Vincent asked why he exposed himself, Powell explained that it was "one of the things that he did to create excitement in his life" following an accident that left him paralyzed from the waist down. R461-62. He also testified that Powell admitted that when he did it, he wore a see-through mesh material. R463.

This evidence was more than sufficient to support the trial court's denial of Powell's motion for a directed verdict. It established that he was in a public place—Walmart and Shopko—and that his genitals were exposed to public view. Powell points to other evidence, or lack thereof, that did not support the finding, such as no surveillance video showing that he was exposed and the stepmom's failure to take a picture showing that he was exposed. But any "conflicts in the evidence" do not justify a directed verdict because, when determining whether the evidence is sufficient to submit the case to the jury or sufficient to support the jury verdict, conflicting evidence

must be resolved "in favor of the jury verdict." *Prater*, 2017 UT 13, ¶32 (cleaned up).[7]

Powell also contends that the evidence of the requisite mental state was insufficient because he covered himself before Anastasia's stepmom took a picture, and he had explained in his written statement that at Shopko, he was trying to undo a kink in his catheter. Aplt.Br. 27,31. While a lack of intent or knowledge may be one inference, the jury could reject that inference in favor of a different inference—supported by his own statement to Det. Vincent—that he intentionally and knowingly exposed himself "for the thrill of it." R462. And this Court is required to accept the latter inference. *See Montoya*, 2004 UT 5, ¶29 (holding the evidence and all inferences fairly drawn from it must be reviewed "in the light most favorable" to the jury verdict).

Moreover, as noted, the evidence need only have established that Powell recklessly exposed himself. A jury could surely conclude that undoing his pants to adjust a condom catheter in a Shopko on a relatively busy

[7] Powell also points to allegations in his affidavit that Walmart security found no evidence of him exposing himself. Aplt.Br. 30-31. But this Court does not consider extra-record evidence on appeal and should strike it. *See Menzies v. Galetka*, 2006 UT 81, ¶52 n.6, 150 P.3d 480 (observing that court does not generally consider extra-record evidence on appeal). In any event, and as explained, such conflicting evidence would not form a basis for a directed verdict. *See Prater*, 2017 UT 13, ¶32.

shopping day was reckless behavior. *See* Utah Code Ann. § 76-2-103(3) (Westlaw, 2019) (providing a person acts recklessly "when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or that the result will occur"). Thus, Powell's claimed rationale for being exposed is hardly a defense to the charges.

In sum, the evidence was more than sufficient to support the lewdness charges and to submit the case to the jury.

CONCLUSION

For the foregoing reasons, this Court should affirm Powell's convictions.

Respectfully submitted on June 11, 2019.

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Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 7,747 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ *Jeffrey S. Gray*
JEFFREY S. GRAY
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on June 11, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ *Jeffrey S. Gray*

ADDENDA

ADDENDUM A

Utah Code Ann. § 76-9-702 (Westlaw, 2019) (Lewdness)

Utah Code Ann. §76-9-702 (Westlaw, 2019). Lewdness.

(1) A person is guilty of lewdness if the person under circumstances not amounting to rape, object rape, forcible sodomy, forcible sexual abuse, aggravated sexual assault, sexual abuse of a minor, unlawful sexual conduct with a 16- or 17-year-old, custodial sexual relations or misconduct under Section 76-5-412 or 76-5-413, or an attempt to commit any of these offenses, performs any of the following acts in a public place or under circumstances which the person should know will likely cause affront or alarm to, on, or in the presence of another who is 14 years of age or older:

(a) an act of sexual intercourse or sodomy;

(b) exposes his or her genitals, the female breast below the top of the areola, the buttocks, the anus, or the pubic area;

(c) masturbates; or

(d) any other act of lewdness.

(2) (a) A person convicted the first or second time of a violation of Subsection (1) is guilty of a class B misdemeanor, except under Subsection (2)(b).

(b) A person convicted of a violation of Subsection (1) is guilty of a third degree felony if at the time of the violation:

(i) the person is a sex offender as defined in Section 77-27-21.7;

(ii) the person has been previously convicted two or more times of violating Subsection (1); or

(iii) the person has previously been convicted of a violation of Subsection (1) and has also previously been convicted of a violation of Section 76-9-702.5.

(c) (i) For purposes of this Subsection (2) and Subsection 77-41-102(17), a plea of guilty or nolo contendere to a charge under this section that is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction.

(ii) This Subsection (2)(c) also applies if the charge under this Subsection (2) has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

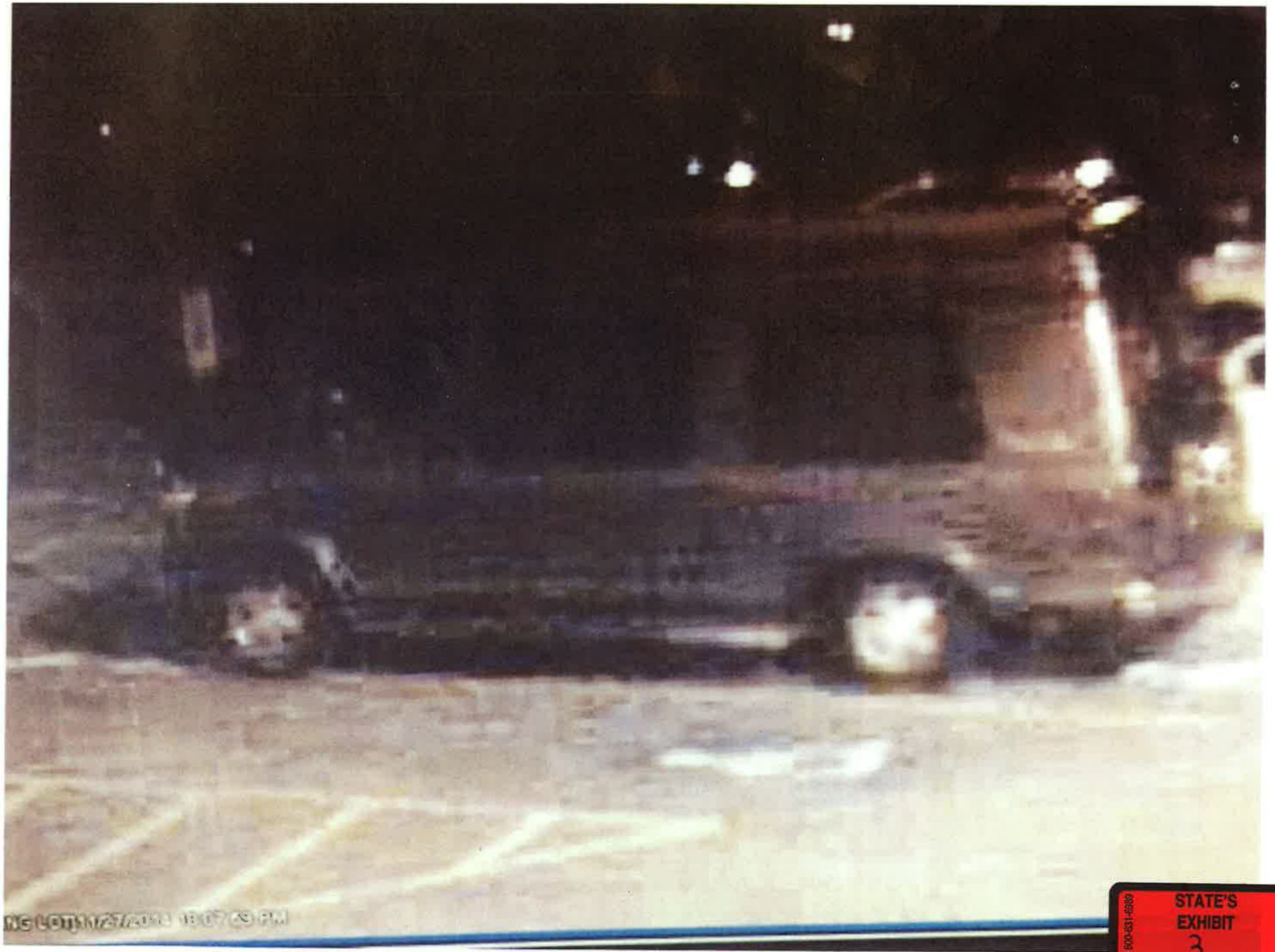
(3) A woman's breast feeding, including breast feeding in any location where the woman otherwise may rightfully be, does not under any circumstance constitute a lewd act, irrespective of whether or not the breast is covered during or incidental to feeding.

ADDENDUM B

- State's Exhibit 1 (witness's photo of Powell in Shopko)
- State's Exhibit 2 (surveillance screenshot of Powell in Shopko)
- State's Exhibit 3 (surveillance screenshot of Powell's van in Shopko parking lot)


DR
STATE'S
EXHIBIT
1
PENSAD 800-631-6989


STATE'S
EXHIBIT
2
PENGAD 800-631-6989



STATE'S EXHIBIT 3

PENGAD 800-631-6989